

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GRACIE BAKED LLC and WECARE RG,
INC., on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

GIFTROCKET, INC.,

Defendant.

Case No. 22-CV-4019 (RPK) (VMS)

JOINT STATUS REPORT AND [PROPOSED] BRIEFING SCHEDULE

Pursuant to the Court's December 15, 2022 Order, the parties jointly write to advise the Court regarding the outcome of the parties' mediation and the parties' positions regarding a briefing schedule.

Mediation outcome and discovery status.

On January 26, 2023, the parties attended a mediation with Judge James Holderman (Ret.), and were unable to negotiate a successful settlement. To date, the parties' have exchanged initial disclosures and limited pre-mediation discovery.

Proposed briefing schedule.

The parties propose the following briefing schedule for Defendant's intended motion to dismiss:

- Defendant's motion to dismiss: February 23, 2023.
- Plaintiffs' opposition: March 27, 2023.

- Defendant’s reply: April 10, 2023.

In accordance with the Court’s bundling rule, briefs will not be filed on the docket until April 10, 2023, when the motion is fully briefed. Cover letters will be filed on the docket in accordance with the proposed dates.

Additional scheduling deadlines.

By February 13, 2023, the parties have separately agreed to:

- File a joint Rule 26(f) report / proposed discovery scheduling order;
- File a joint proposed ESI protocol; and
- Exchange responses to the parties’ first requests for production.

Defendant will send a draft ESI protocol to Plaintiffs, and Plaintiffs will send a draft Rule 26(f) report to Defendant, on or before February 8, 2023.

Plaintiffs’ position regarding any amended complaint.

Today, Defendant informed Plaintiffs that it “believe[s] Plaintiffs’ time to amend by right has expired,” and that the service of the pre-motion conference letter Defendant filed on October 17, 2022, *see* ECF No. 19, started the clock for Plaintiffs’ to amend as of right, *see* Email from Defense Counsel, annexed as Exhibit A. Plaintiffs believe such an interpretation of the Court’s Individual Rules runs contrary to the Federal Rules.¹

¹ Indeed, although the Eastern District of New York regularly uses the helpful procedural mechanism of a pre-motion conference, that mechanism does not supersede procedural rights set forth in other court rules more generally. Thus, amendments of right under Rule 15(a)(1)(B) are made by plaintiffs in this District far beyond twenty-one days past the filing of pre-motion letters, pegged instead to the date of service of the actual motion to dismiss. *See, e.g., Madorskaya v. Frontline Asset Strategies, LLC*, No. 19-CV-00895 (E.D.N.Y.), ECF Nos. 7 (Letter to Hon. Pamela K. Chen, U.S.D.J. Requesting a Pre-Motion Conference in Lieu of an

Plaintiffs reserve their right under the Federal Rules to determine whether to amend their pleading upon receiving Defendant's motion to dismiss. *See* Fed. R. Civ. P. 15(a)(1)(B).

Defendant's position regarding any amended complaint.

Defendant's position is simple: if Plaintiffs intend to amend the Complaint to address issues raised in the pre-motion letters, they should do so now, rather than waiting until Defendant has expended resources briefing issues that may become moot through amendment. If circumstances change during the course of briefing, then Rule 15(a)(2) provides a means to amend.

Dated: February 2, 2023

Respectfully submitted,

/s/ Alison Borochoff-Porte

Alison Borochoff-Porte

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Answer), No. 11 (Letter to Plaintiff's Counsel re. Motion to Dismiss), No. 12 (Am. Compl.), No. 19 (Order), ECF Order dated March 13, 2019, and ECF Order dated May 28, 2019.

Dated: February 2, 2023

Respectfully submitted,

/s/ Megan O'Neill
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, the foregoing the foregoing document was filed with the Clerk of the Court via this Court's CM/ECF electronic filing system, and served on all counsel of record.

Dated: February 2, 2023

Respectfully submitted

/s/ Alison Borochoff-Porte

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